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No. 114

In the Supreme Court of the United States

OCTOBER TERM, 1930

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE UNITED STATES TO ADVANCE

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Comes now the Solicitor General, on behalf of the United States of America, and moves the Court to advance the above-entitled cause for hearing immediately after the argument in case No. 74, *United States* v. *Anthony LaFranca,* on the docket of this Court, and as grounds for the motion respectfully represents:

1. Case No. 114, sought to be advanced, is before the Court on a writ of certiorari, granted October 13, 1930, to review a judgment of the Circuit Court of Appeals for the Second Circuit which affirmed

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a judgment of the District Court for the Southern District of New York declaring forfeited under Sections 3257 and 3281 of the Revised Statutes a distillery, warehouse, and denaturing plant of the petitioner corporation. Sections 3257 and 3281 provide for the forfeiture of property of a distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled, or who engages in such business with intent to defraud the United States of such tax. The tax in question was alleged in the libel to be that imposed by Section 600 (a) of the Revenue Act of 1918, as amended.

The case presents, among others, the following questions: (1) Whether under the decisions of this Court in *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386, the "tax" imposed by Section 600 (a) is in reality a penalty, so that the defrauding or attempting to defraud of it did not constitute a defrauding or attempting to defraud of a "tax," within the meaning of Sections 3257 and 3281; and (2) whether by reason of the fact that the petitioner corporation had been convicted because of the same transaction of having conspired with others to violate the National Prohibition Act, the Government was barred from proceeding to forfeit the property of that company by Section 5 of the Willis-Campbell Act, which declares that, if an act is a violation of the National Prohibition Act and also of the prior internal-

revenue laws, a conviction for such act under one of those laws shall bar a prosecution therefor under the other.

2. In case No. 74, *United States* v. *Anthony LaFranca*, which is before the Court on a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, granted May 5, 1930, the Government brought suit to recover from LaFranca double taxes and penalties alleged to have been incurred by him under Section 35, Title II, of the National Prohibition Act, and under other statutes, because of sales of liquor for which he had been previously convicted under that Act. A judgment for the United States was reversed by the Circuit Court of Appeals on the ground that the suit was barred by Section 5 of the Willis-Campbell Act because: (1) Under the decisions in the *Lipke* and *Regal Drug Corporation cases, supra*, the so-called "taxes" and other charges sued for were penalties imposed for criminal misconduct; (2) a civil suit for the recovery of such a "penalty" may properly be regarded as a prosecution for an offense, and (3) as liability for the "taxes," the doubled amount of which was sued for, arose under the prior internal revenue laws, the suit was a prosecution which was barred by Section 5 of the Willis-Campbell Act, because the taxes sued for were penalties incurred by reason of the acts for which there had been a prior conviction under the National Prohibition Act.

3. As substantially the same questions are involved in the two cases, it is believed that the argument of the *Waterloo Distilling Corporation case* should immediately follow the argument of the *LaFranca case* in order that the two cases may conveniently be considered and disposed of by the Court at the same time. Therefore, this motion is presented.

Notice of this motion has been served on opposing counsel.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

NOVEMBER, 1930.

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